Pre-Trial Conference in Federal Court Practice*

FRANK L. KLOEB**

The pre-trial conference gives to the court and the interested parties the opportunity to narrow the issues, to stipulate to certain facts, to limit the number of expert witnesses, to compile an accurate trial docket, and to arrive at a settlement. It is thought that a review of the operation of pre-trial practice in the Federal Courts might be of some assistance to those who may desire to adopt or participate in this procedure. Rule 16[1] of the Federal Rules of Civil Procedure which became effective September 16, 1938, made provision, for the first time, for a pre-trial conference. The recent amendments to the Federal Rules, which became effective March 19, 1948, make no change in the pre-trial rule.

The implementation of the rule is left entirely within the discretion of the court. It may invoke the rule and conduct pre-trial procedures in all or a selected few of the cases on the assignment calendar, or may disregard the rule entirely and forego pre-trial procedure.

---

* An address delivered before the first annual meeting of the Law College Alumni Association of Ohio State University at Columbus on April 17, 1948.

** Judge of the United States District Court for the Northern District of Ohio. The bibliography, which appears at the end of the article, was prepared by Jack W. Folkerth, a member of the editorial board of the Journal.

[1] Rule 16 of the FEDERAL RULES OF CIVIL PROCEDURE reads: "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

It will be advantageous, first, to consider the development under the rule since its adoption and, second, to treat the subject from the practical everyday operational viewpoint.

In April, 1944, the Hon. John J. Parker, United States Circuit Judge for the Fourth Judicial Circuit, serving as chairman of the committee appointed by the Judicial Conference to study the operation of the pre-trial rule, sent a questionnaire to the district judges to ascertain the extent of the use of such conferences. In a letter accompanying the questionnaire he stated that a preliminary report of his committee indicated that only twenty-one Federal District Courts out of eighty-five were making widespread use of pre-trial procedure, and that this use was small in comparison with the total number of cases disposed of. After the replies to this questionnaire had been received, Mr. Will Shafroth, statistician for the Administrator of the Federal Courts, prepared an article[2] on pre-trial procedure, in which the gist of a number of the replies of the district judges was reflected.

At the instance of the committee on pre-trial procedure of the Judicial Conference of Senior Circuit Judges, Professor Sunderland prepared a paper[3] on pre-trial procedure, for private distribution to members of the Federal judiciary. The practical suggestions contained in it, as well as in the article of Mr. Shafroth, make them of great value to state court judges who may be interested in adopting pre-trial practice and in getting the most out of the practice once it has been adopted.

At the last session of the Judicial Conference held in September, 1947, a committee, headed by Judge Parker, was appointed to study ways and means of economy in the operation of the Federal Courts. A progress report of that committee made in February, 1948, contained a list of suggestions for effecting economies in the court's operations, and one of these suggestions was pre-trial procedure.

The district judges today are making more general use of pre-trial procedure than in 1944, when Mr. Shafroth published his article[4] based upon statistics compiled after the rule had been in effect for five and one-half years. Furthermore, the pre-trial techniques employed have been considerably refined and improved as a result of use since 1944.

In my own practice, I consistently follow the policy of con-

---

[2] Shafroth, *Pre-Trial Techniques of Federal Judges*, 28 J. AM. JUD. SOC'Y 39 (1944).

[3] Sunderland, *Procedure for Pre-Trial Conferences in the Federal Courts*, 28 J. AM. JUD. SOC'Y 46 (1944).

[4] Shafroth, *Pre-Trial Techniques of Federal Judges*, 28 J. AM. JUD. SOC'Y 39 (1944).

ducting pre-trial conferences on most of the cases assigned for trial. For example, if an assignment of sixty cases, both jury and non-jury, is published, the notice of assignment also contains a notice of pre-trial conferences which are to be held at a time not less than two weeks after the date of first publication of the assignment, and not less than two weeks before the effective date of the trial assignment. There may be a number of cases assigned for trial in which pre-trial conference is deemed inadvisable, and where this occurs, counsel are instructed that it is unnecessary for them to appear on pre-trial conference day.

It is found advantageous to have a definite assignment for trial of cases that are scheduled for pre-trial conference, because the lawyers involved realize that they are facing a barrier and must prepare for trial. They, therefore, are more diligent in preparing for the pre-trial conference day because they are preparing for trial at the same time.

The pleadings in all cases assigned for pre-trial must be studied so that the court may be as conversant with the issues as are counsel. I have a standing requirement of pre-trial briefs, and these must be filed in advance of pre-trial day. This procedure makes it necessary for counsel to analyze the law diligently in advance of pre-trial day, and thus enables them to ascertain both their strength and weakness before they appear for the pre-trial conference.

Pre-trial conferences are conducted in the court room, since I find that all matters are handled more expeditiously in this manner than if conducted in chambers. The conferences are informal, and the lawyers are so advised at the opening of each conference. The clerk calls each case in the order of the assignment; the lawyers, when called, take their places at the pre-trial table, and we proceed with a discussion of the pleadings and any possible amendments thereto, the issues involved, methods of facilitating proof, agreements and stipulations between counsel, and, finally, we conclude in many of the cases, with a query by the Court as to whether the possibilities of settlement have been explored by counsel. If counsel indicate a willingness to discuss the question of settlement, they are invited to retire from the court room for such a discussion, or to fix some other more convenient time. I never participate in these discussions, nor do I learn from counsel their substance. It is a serious error, particularly in non-jury cases, to permit counsel to disclose to the court the basis of settlement talk.

In jury cases trial can often be facilitated by agreement of counsel on physical examinations of the injured party, or parties, or by agreement upon the number of witnesses that may be called to testify on some particular point. Many times counsel have conflicting dates in other courts. For this reason there is some elasticity

allowed so that cases may be dropped down a week or advanced a week to suit the convenience of counsel. It is particularly valuable at the pre-trial conference, and after the issues have been pared down or thoroughly explored, to obtain the views of counsel as to the number of days that the trial will likely consume. This results in a great saving of time, not only for the court but for counsel, witnesses, and jurymen, as cases can be spaced for trial according to the merits involved in each case. This system is beneficial to all parties concerned because counsel are able to secure a day certain for the trial of their case, rather than have it assigned with a number of other cases for a particular week without a day certain, and be required to be ready for court during the entire week.

I never make use of pre-trial practice in connection with criminal cases. Some courts may follow the practice, but if they do, they undoubtedly are careful to make certain that the defendant and his counsel are in court throughout the conference.

In most districts and, of course, where there is but a single judge, the trial judge presides at all pre-trial conferences. In some multiple judge districts a different judge is used for pre-trial work than the judge who is actually assigned later to try the case.

An interesting observation on the value of pre-trial conference may be drawn from my own experience in recent years in connection with two anti-trust cases. The anti-trust case brought against the glass container industry was tried in the years 1941 and 1942. No pre-trial conference as such was ever held, although there were numerous conferences at the request of counsel for both sides directed to the end of securing a consent decree. As a result, it was necessary for the Government, in the presentation of its case, to call numerous witnesses to the stand for long periods of time, in order to have them identify some 3,300 letters, memoranda, and agreements covering a period of some twenty-five years, that had been found in the files of the defendant companies. This requirement added many weeks to the trial of the case.

I am now engaged in the trial of an anti-trust case brought against the so-called flat glass industry, and the evidence seeks to cover a period of approximately twenty years prior to the filing of the complaint in 1945. There doubtless will be several thousand exhibits admitted in this case before the trial is ended. Because of very intensive pre-trial conferences that were held over a period of more than a year prior to the commencement of the trial, stipulations were entered into by counsel that make it unnecessary to have witnesses present on the stand to identify most of these thousands of documents. This trial began on March 1, 1948, and through the agreements and stipulations of counsel arrived at as a result of pre-trial conferences, it may be possible to conclude the trial within

a period of about eight months, thus substantially shortening the trial time. It can readily be seen why I am an enthusistic believer in the usefulness of pre-trial conferences.

It is quite probable that the successful operation of pre-trial practice in the federal courts has served as an inducement to the local state courts to give the plan a trial. Within the past two months, the Common Pleas Judges of Lucas County, Ohio, have adopted a somewhat similar method of pre-trial procedure that they follow diligently each Monday. I am confident that the practice will become a permanent fixture with these courts, and trust that it will be adopted in many more courts throughout the state.

BIBLIOGRAPHY ON PRE-TRIAL PROCEDURE

Ballantine, *Pre-Trial Conference*, [1941] Ky. S.B.A. 81.

Brand, *"Mighty Oaks"—Pretrial*, 26 J. Am. Jud. Soc'y 36 (1942).

Carver, *Should Florida Adopt the Pre-Trial Procedure as Set Forth in the New Federal Rules?* 13 Fla. L.J. 226 (1939).

Crawford, *Legal Problems of the Pre-trial Conference*, 31 Corn. L.Q. 285 (1946).

Douglas, *Pre-trial Procedure*, 26 A.B.A.J. 693 (1940).

Fisher, *Judicial Mediation: How It Works through Pre-trial Conference*, 10 U. of Chi. L. Rev. 453 (1943).

Freifield, *Broader Aspects of Pretrial*, 26 J. Am. Jud. Soc'y 24 (1942).

Gershenson, *Pre-trial Procedure*, 26 Wash. U.L.Q. 348 (1941).

Grimm, *Statutory Procedure in Ohio Comparable to Federal Court Pre-trial Procedure*, 29 Ohio Op. 419 (1945).

Hasson, *Pre-trial Practice in Pennsylvania*, 17 Notre Dame Law. 40 (1941).

Hayes, *Lawyers' Interest Advanced by Rule 16*, 25 J. Am. Jud. Soc'y 84 (1941).

Hemphill, Daily, Jenner, and LaBuy, *Pre-trial Symposium*, 29 Ill. B.J. 61 (1940).

Hughes, Kaftan, *Pleading and Pre-trial Practice, Wisconsin Code Compared with the New Federal Rules of Procedure*, [1938] Wis. L. Rev. 517.

Johnson, K. M., *Antecedents of the Pre-trial Plan*, 13 Cal. St. B.J. 19 (1938).

Johnson, W. C., *Nebraska Pre-trial Procedure; Formulation of Issues—Pretrial Conference Adopted for Nebraska District Courts*, 26 Neb. L. Rev. 110 (1946).

Laws, *Pre-trial Procedure under the New Federal Rules*, 12 Mo. B.J. 95 (1941).

Laws, *Plan for Pre-trial Procedure under the New Rules in District of Columbia*, 25 A.B.A.J. 855 (1939).

McNaugher, *The Pre-Trial Court at Pittsburgh*, 6 U. of Pitt. L. Rev 5 (1939).
Moynihan, *Pre-trial Practice and Procedure*, 17 Neb. L. Bull. 207 (1938).
Moynihan, *Observations on Pre-trial Procedure*, 11 Mo. B.J. 144 (1940).
Murrah, *Pre-trial Procedures; Some Practical Considerations*, 26 A.B.A.J. 592 (1940).
Nims, *Pre-trial in the United States*, 25 Can. B. Rev. 697 (1947).
Peacock, *Pre-trial and the Appellate Courts*, 24 J. Am. Jud. Soc'y 173 (1941).
Phillips, *Pre-trial—Optional or Mandatory?* 15 Conn. B.J. 150 (1941).
Shafroth, *Pre-trial Techniques of Federal Judges*, 28 J. Am. Jud. Soc'y 39 (1944).
Simpson, *A Possible Solution of the Pleading Problem*, 53 Harv. L. Rev. 169 (1939).
Smith, *Amazing Success of Pretrial on Special Dockets*, 25 J. Am. Jud. Soc'y 46 (1941).
Sunderland, *Procedure for Pre-trial Conference in the Federal Courts*, 28 J. Am. Jud. Soc'y 46 (1944).
Sunderland, *Theory and Practice of Pre-trial Procedure*, 21 J. Am. Jud. Soc'y 125 (1937).
Sunderland, *Growth of Pre-trial Procedure*, 44 Com. L.J. 406 (1939).
Sunderland, *The Function of Pre-trial Procedure*, 6 U. of Pitt. L. Rev. 1 (1939).
Sweeney, *Expert Use of Pretrial Docket in Federal Courts*, 23 J. Am. Jud. Soc'y 11 (1939).
Weisman, *Give Pre-trial a Trial*, 25 J. Am. Jud. Soc'y 24 (1941).
A Survey of the Administration of Justice in New England; Pre-trial Conferences and Summary Judgments, 23 B.U.L. Rev. 28 (1943).
Indiana Pre-trial Procedure, 22 Ind. L.J. 280 (1947).
Pittsburgh Pre-trial Post-mortem, 28 J. Am. Jud. Soc'y 121 (1944).
Pretrial Procedure under the New Iowa Rules, 29 Iowa L. Rev. 82 (1943).
Pre-trial Procedure; Demonstrations at Annual Meeting of [Missouri] Judicial Conference, 15 Mo. B.J. 77 (1944).
Pretrial is Readily Adapted to Rural Counties, 26 J. Am. Jud. Soc'y 106 (1942).
Pre-trial Procedure; Report of Committee, 13 Conn. B.J. 164 (1939).
Pre-trial Procedure—France and Germany, 21 J. Am. Jud. Soc'y 83 (1937).